UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ADMINISTRATIVE REVIEW BOARD

In the matter of:

SAPORITO ENERGY CONSULTANTS, INC. and THOMAS SAPORITO

COMPLAINANTS,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

RESPONDENT.

_____/

ARB NO. 10-083

ALJ NO. 2009-ERA-00016

DATE: 27 JUN 2010

COMPLAINANTS' REBUTTAL BRIEF

Saporito Energy Consultants and Thomas Saporito, *pro se* (hereinafter "Complainants") hereby file *Complainants' Rebuttal Brief* in the above-captioned matter and state as follows:

On June 10, 2010, Respondent, U.S. Nuclear Regulatory Commission (NRC), filed *"Respondent U.S. Nuclear Regulatory Commission Reply to Complainant's Initial Brief"* (Reply). For the reasons stated below, the Administrative Review Board (ARB) should reject and deny Respondents' Reply as a matter of law:

A. RESPONDENTS' REPLY FAILS TO MEET THE FORMAT REQUIREMENTS ESTABLISHED IN THE ARB'S BRIEFING ORDER

On April 22, 2010, the ARB issued a *"Notice of Appeal and Order Establishing Briefing Schedule"* (Order), in the above-

captioned matter. In its Order, the ARB specifically and precisely stated, in relevant part, that:

> **"All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1 1/4 inch top and bottom margins, printed on 8 1/2 by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted. If a party fails to file a brief that complies with the requirements of this briefing order, the Board may refuse to accept the brief, and if the brief is an initial brief, the Board may dismiss the appeal. *See, e.g., Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-6 (ARB Dec. 30, 2004)." (Emphasis in original).**

Id. at pp.1-2.

Despite the clear an unambiguous language in the ARB's Order, Respondent none-the-less chose to simply ignore the dictates of this Court and submit [their] Reply brief formatted outside the ARB's Order. In particular, Respondent's Reply brief was apparently constructed with "left" margins less-than the required one-inch and with a font providing 12-characters per inch and outside the 10-character per inch of the ARB's Order. This is not the first-time that NRC has knowingly violated the dictates of ARB orders. Notably, NRC has previously engaged in the exact same conduct in the past in filings before the ARB. Such conduct by professional legal counsel simply cannot be

tolerated by the ARB especially where, as here, *pro se*, litigants are held accountable to the ARB's brief format requirements. *See, Thomas Saporito and Saporito Energy Consultants v. Florida Power and Light Company, Nextera Energy Resources, LLC, Lewis Hay III, Mitchell S. Ross, Antonio Fernandez, Steve Hamrick, and U.S. Nuclear Regulatory Commission,* ALJ No. 2009-ERA-00006, (ARB No. 09-129), Complainants' Motion in Opposition to Respondent U.S. Nuclear Regulatory Commission Request for Leave to Reply to Complainants' Rebuttal Brief and Respondent's Reply dated October 24, 2009.

Thus, for this reason standing alone, the ARB should deny and reject Respondent's Reply as a matter of law.

B. RULE 41 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS CONTROLLING

Respondent's argue in their Reply that,

> "...Prior to the implementation of the new rules under 29 CFR 24, a motion to withdraw pursuant to Rule 41 of the Federal Rules of Civil Procedure would have been appropriate and in accordance with the Department of Labor's rules found at 29 CFR part 18...In August, 2007, the Department of Labor published numerous amendments to 29 CFR Part 24....29 CFR §24.111(c) now provides that 'At any time before the findings or oder become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law

> judge...now that 29 CFR Part 24 contains a specific, controlling provision with respect to the withdrawal of complaints...29 CRR Part 18 (and thus Rule 41) is no longer applicable...to the ERA."

Id. at pp.6-7.

However, as clearly indicated on the Department of Labor's (DOL's) website[1], USDOL/OALJ Nuclear and Environmental Whistleblower Digest DIVISION XVIII -- DISMISSALS, the latest update shows Rule 41 was made on April 7, 2008, and well after the 2007 date alleged by Respondents. Thus, Rule 41 is controlling in these circumstances. Moreover, contrary to Respondent's assertions made in their Reply, Complainants never withdrew their objections to the findings of the Occupational Safety and Health Administration (OSHA), but rather simply requested to withdraw their complaint before the assigned ALJ.

C. JURISDICTIONAL LATCH PREVENTS REMAND TO OSHA

Respondents argue in their Reply that, "...Judge Johnson's Order is clear that the case is not being remanded, but rather that the findings of OSHA will become the final order in the case...". *Id. at* p.9.

However, once the jurisdiction of the complaint went from OSHA to the ALJ, a "jurisdictional-latch" was automatically

1 See, Complainant's Initial Brief dated May 17, 2010 filed in this matter at p3.

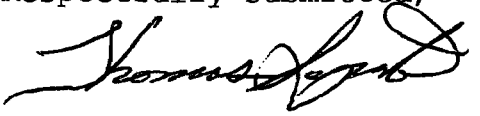
invoked preventing adjudication of the matter back to OSHA. This is not a simply matter where OSHA's preliminary findings were objected to and an ALJ was assigned to hear the merits of the case at hearing without any findings made on the merits by the ALJ. Rather, in the instant action, the ALJ did, in fact, make certain and specific rulings on the merits of the complaint. In so doing, the ALJ cannot simply undo those adjudications as if they did not occur and allow the preliminary findings of OSHA to become the final decision of the Secretary in these circumstances. Instead, the ALJ should have simply honored Complainants' request and allowed the withdrawal of the complaint.

Notably, in *Hutchins v. TNT Logistics,* ARB No. 05-065, ALJ No. 2004-STA-9 (ARB Jan. 31, 2008), the ARB held that it must issue the final order where the complainant requests to withdraw his objections to the Secretary's preliminary findings. In so holding, the ARB declined to follow the 1987 holding of the Secretary of Labor in *Underwood v. Blue Springs Hatchery,* 1987-STA-21 (Sec'y Sept. 23, 1987), an Order to Show Cause stating that an ALJ's order approving a withdrawal becomes the final administrative order in a case.

CONCLUSION

FOR ALL THE ABOVE STATED REASONS, the ARB should (1) deny and reject Respondent's Reply as a matter of law in failing to submit a brief which complied with the ARB Order's format requirements; (2) find that the ALJ lacks authority to remand this matter to OSHA's preliminary findings; and (3) vacate the ALJ's Order and remand this matter back to the ALJ to issue a new Recommended Decision and Order accordingly.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing document was provided to those identified below by means indicated on this 17th day of June, 2010:

U.S. Department of Labor
Administrative Review Board
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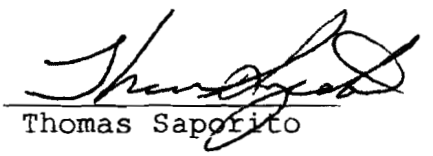
By: 
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